FILE COPY.

FILED.
DEC 3 1906
JAMES H. McKENNEY

IN THE

Supreme Court of the United States.

October Term, 1906.

No. 97.

ALABAMA & VICKSBURG RAILWAY COMPANY *et al.*,
Plaintiffs in Error.

Versus

THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI,
Defendant in Error.

SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR.

HARRY H. HALL,
Counsel for Alabama & Vicksburg Railway Company.

McWILLIE & THOMPSON
Associate Counsel.

IN THE

Supreme Court of the United States.

October Term, 1906.

No. 97.

ALABAMA & VICKSBURG RAILWAY COMPANY *et al.*,
Plaintiffs in Error.

Versus

THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI.
Defendant in Error.

SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR.

During the argument a Justice of this Court put the following question, as we recollect it:

> *"Assuming that a merchant in Vicksburg brought in ten cars of grain from St. Louis, by the Yazoo & Mississippi Valley Railroad, and another merchant brought into Vicksburg ten cars of grain from St. Louis over the Vicksburg, Shreveport and Pacific Railway; further assuming that both merchants desired to ship some or all of this grain from Vicksburg to Meridian. The merchant who brought in his grain over the Vicksburg, Shreveport and Pacific Railway could forward his ten cars on the balance of the through rate, to-wit: 3 1-2 cents per 100 lbs, whereas, the merchant who had brought in his ten cars by the Valley*

Railroad could not forward them at 3 1-2 cents, but would have to pay a greater rate, in this situation would it not be justice to order that both merchants should have open and available to them the same rate of 3 1-2 cents, and is it not undue discrimination to deny to the merchant who uses the Valley Road the same rate which is available to the merchant who uses the V. S. & P. R. R.?"

The answer to this question depends upon the facts.

Unjust discrimination is always a question of fact, as this Court has definitely decided in the Import Rate Case.

Texas & Pacific Ry. vs. I. C. C., 162 U. S. 197.

The Import Rate Case presented the following situation:

A charge of $3.70 per hundred pounds was made upon domestic traffic originating at New Orleans and destined to San Francisco, whereas a charge of 80 cents per hundred pounds from New Orleans to San Francisco was made upon imported traffic originating at Liverpool and passing through New Orleans destined to San Francisco. The goods, both foreign and domestic, might and did travel in the same cars from New Orleans to San Francisco.

The Interstate Commerce Commission held that this was undue discrimination against the local shipment originating at New Orleans and an unjust preference to the foreign shipment.

3 I. C. R. 417; 52 F. R. 187; 57 F. R., 948.

Upon great consideration this Court held that there was no undue discrimination involved in this transaction.

Texas & Pacific Railway Co. vs. I. C. C., 162 U. S. 197.

The mere fact therefore that the Vicksburg local shipper will pay more on a shipment originating at Vicksburg and

destined to Meridian than 3 1-2 cents per hundred pounds, the sum paid as part of the through shipment, would not constitute undue discrimination.

In the Import Rate Case the goods had to be unloaded from the ship at New Orleans and reloaded on the cars at New Orleans. It was, therefore, contended that local goods originating at New Orleans, inasmuch as they had to be loaded on the cars and had to be carried forward in the same cars, were in the identical situation in these respects as the imported goods. So it is urged here that the local shipment of grain originating at Vicksburg has to be loaded on the cars equally as well as the through shipment which has been stopped off at Vicksburg, and that both shipments are in identically the same situation and it is undue discrimination for one to be transported on to Meridian at a less rate than the other.

The Import Rate Case effectually disposes of this contention and we will not elaborate further on this phase of the subject, but will merely refer to the Import Rate Case which is conclusive.

The principle decided by the United States Supreme Court in the Import Rate Case has been applied by the Interstate Commerce Commission to export traffic and the Commission has held that it is no undue discrimination to charge 17 cents from Chicago to New York on domestic grain while charging 12 cents from Chicago to New York on export grain.

> See elaborate opinion of the Interstate Commerce Commission *in re* Export and Domestic Rates, 8 I. C. R., 214.

In this case the Commission also sustained three separate and distinct rates between Kansas City and New Orleans, holding that there was no undue discrimination in maintaining these different rates. Wheat sent from Kansas City to New Orleans for domestic consumption was charged 27

cents per hundred pounds. Wheat originating at Kansas City and sent to New Orleans for export was charged 21 cents per hundred pounds. Wheat received from a connection at Kansas City and proceeding on to New Orleans for export was charged 10 cents per hundred pounds.

The mere fact that there was a difference in the rates was held by the Commission not to constitute undue discrimination, and that a certain difference was absolutely necessary to keep the port of New Orleans and other ports, such as Boston, open for export traffic.

The Commission confirmed fully the principle that some difference was warranted, but expressed doubt as to the amount or degree of difference in some of the instances before it.

A similar ruling was made by the Commission in the case of Edward Kemble vs. B. & A. R. R., *et al.*, 8 I. C. R. 110, and it was held that the mere fact that there was a higher rate on grain between Chicago and Boston when said grain was used for domestic consumption, than on the same grain between Chicago and Boston when for export constituted no undue discrimination.

In the case of Interstate Commerce Commission vs. B. & O. R. R., 145 U. S. 263, Mr. Justice Brown cited with approval passages from the opinion of Judge Jackson in the Court below, and amongst other things said:

> "It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable."
>
> I. C. C. vs. B. & O. R. R., 145 U. S. 263, 276.

Again speaking of the sale of a ticket for a number of passengers at a less rate than for a single passenger, this Court said:

> " * * * It does not operate to the prejudice of the single passenger, who can not be said to be injured by the fact that another is able in a particular instance to travel at a less rate than he. If it operates injurious-

> ly toward anyone it is the rival road, which has not adopted corresponding rates; but, as before observed, it was not the design of the Act to stifle competition, *nor is there any legal injustice in one person procuring a particular service cheaper than another.* * * * If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single trip passenger would gain absolutely nothing." (Italics ours.)
>
> I. C. C. vs. B. & O. R. R., 145 U. S. 263, 280-281.

This Court used the following language in the Import Rate Case:

> "The 6th section of the Act of Congress, July 1, 1862, relative to the Union Pacific Railroad Company, provided that the Government shall at all times have the preference in the use of the railroad 'at fair and reasonable rates of compensation, not to exceed the amount paid by private parties for the same kind of service.' In the case of Union P. R. Co. vs. United States, 117 U. S. 355, it was, in effect, held that the service rendered by a railway company in transporting local passengers from one point on its line to another is not identical with the service rendered in transporting through passengers over the same rails."
>
> T. & P. R. Co. vs. I. C. C., 162 U. S. 197, 231.

All the cases were reviewed in the Import Rate Case and it has been thoroughly established that the mere fact that a greater charge is made between two points for transporting an article or passenger in the same car does not in itself constitute undue discrimination, but that all the circumstances surrounding the traffic must be taken into consideration.

These circumstances were fully set forth in the Import Rate Case. And it was there laid down that in order to determine whether a certain charge constituted undue discrimination as compared with another charge, it was necessary and proper to take into consideration

"Besides the mere difference in charges, various elements, such as the convenience of the public, the fair interests of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the company, and the situation and circumstances of the respective customers with reference to each other as competitive or otherwise."

162 U. S. 232.

This Court in said Import Rate Case repeatedly stated that in deciding such a question as this, it was necessary for the tribunal to consider:

(1) The legitimate interest of the carriers.

(2) The legitimate interests of the traders and shippers.

(3) The welfare of the various communities involved.

(4) The welfare of the localities where the goods are delivered.

(5) The welfare of the communities which are in the locality of the place of shipment.

(6) Competition that affects rates.

(7) The fact that goods would go by other competitive routes should be considered.

(8) The fair interests of the carriers affected.

(9) The welfare of the community which is to receive and consume the commodities are to be considered.

162 U. S. 233, 234.

Looking at the transaction then in the light of all these facts it appears

(1) That the interest of the producer in the far West is conserved by low rates on grain brought about by "rebilling," "reconsigning," "divisions of through rates," "milling in transit arrangements," etc. In other words any arrangements permitting grain to move on a low rate from point of production to point of consumption is in the interest of the producer.

(2) Looking to the interests of the consumer such arrangements are calculated to benefit him, for they usually result in lower prices.

(3) Looking to the interests of the particular locality which in this case is Vicksburg, it undoubtedly is benefited by the arrangements, as otherwise the grain would not be rehandled at Vicksburg, but would move right on or take other routes, and this particular trade would be lost to Vicksburg. Just as New Orleans and Boston would be closed for the export trade of grain without the rebilling arrangements existing there.

(4) The fair interest of the carrier should likewise be considered and it is quite proper for the Alabama & Vicksburg Railway Company to make arrangements by which grain could be brought over a line with which it has entered into through rates and divisions such as the Vicksburg, Shreveport and Pacific Railroad, instead of some rival line like the Yazoo and Mississippi Valley Railroad. If the same arrangement should be enforced between the Alabama and Vicksburg and the Yazoo & Mississippi Valley Railroad as now exists with the Vicksburg, Shreveport and Pacific Railroad, it is probable that grain from St. Louis would go over this rival line and be lost to the Vicksburg, Shreveport and Pacific Railroad.

It is likewise probable that rival competing water lines operating on the river would take the grain from the line now formed by the Alabama and Vicksburg and the Vicksburg, Shreveport and Pacific. It is certainly not to the interest of these latter carriers that this result should follow, and that fact must be considered under the Import Rate Case.

It must be always borne in mind that the present arrangements are open to any one at Vicksburg who will patronize the Alabama and Vicksburg Railway and the Vicksburg, Shreveport and Pacific Railroad, and no one is prevented

from doing so. Therefore, as to all persons who care to patronize these lines, these arrangements are open to each and every one of them.

If a shipper at Vicksburg voluntarily chooses to patronize some other line, a rival and competitor of this line, it is difficult to see wherein he is injured or discriminated against when it is perfectly open to him to patronize the Vicksburg, Shreveport and Pacific and get the benefit of the rebilling arrangements.

In the West Coast Naval Stores Case this Court held that it is no undue discrimination for a railway company to form an exclusive connection with a certain steamship line and to confine the shipper to the use of this through line, declining at the same time to permit the shipper to use its wharf for the purpose of delivering goods to another and competing steamship line.

This Court held that as long as the through line was kept open to all shippers on equal terms there could be and was no undue discrimination.

198 U. S. 483.

In this connection this Court said:

> "If plaintiff chose to employ, for the further transportation of its goods, the vessels with the managers of which the defendants had some business arrangement or contract, it is not denied that the defendant would and did permit such transportation. In this respect there is no allegation that the plaintiff did not have equal facilities with all other shippers. Defendant's plea avers that it did give to plaintiff the same facilities for shipping its goods over defendant's wharf that it gave to any or all shippers. In brief, the fact seems to be that the only complaint of the plaintiff is that defendant will not permit competing vessels to make use of its wharf for the purpose of such competition."
>
> 198 U. S. 483, 494.

A Railroad May Prefer Itself and Its Connections Without Being Guilty of Undue Discriminations.

The Supreme Court of Mississippi seems to be under the impression that there is something fraudulent and wrong in a railway promoting its own interests and those of its partners with whom it may have formed through lines with through rates and divisions.

The Supreme Court of Mississippi speaks of the transaction as

> "a cloak assumed to conceal an arrangement which while ostensibly granted as a concession to the Vicksburg dealers, was in truth, devised for the ulterior purpose of fostering the interests of the Vicksburg, Shreveport and Pacific Railroad Company."
>
> Transcript of Record, pages 105-106.

It also uses such expressions as "under the guise of a rebilling rate," a "so-called rebilling rate," etc., apparently taking the view that this very beneficent arrangement which is the commercial life of every port in the United States and the commercial life of every city where milling in transit is done, and is openly and commonly practiced at numerous points in the United States in the interest of the very existence of commerce, has something dark, sinister and dangerous connected with it.

It is hard to believe that the Supreme Court of Mississippi would have used this language if it had read the opinions of the Interstate Commerce Commission in the Compressing in Transit Case, wherein the commercial life of Memphis as a cotton center was involved.

8 I. C. R. 121.

Or if that Court had read the elaborate opinion of the Interstate Commerce Commission in the Export Grain cases.

8 I. C. R. 110;
8 I. C. R. 214.

These cases disclose the wide prevalence of such arrangements as are now attacked at Vicksburg and the absolute necessity of the same for the purpose of keeping open every other Atlantic and Gulf port in this country except New York. The Commission therein states that were it not for such arrangements Boston and New Orleans would be closed as ports of export.

It is not unlawful for a railroad to prefer itself, nor does it amount to undue discrimination.

In the case of Central Stock Yards vs. Louisville & Nashville Railroad Company, 192 U. S. 568, it appeared that one railroad preferred to use its own yards instead of those of another and rival line. This Court said:

> "It could not be said that the defendant was giving an undue or unreasonable preference to itself or subjecting its neighbor to an undue or unreasonable disadvantage if it insisted on delivering live stock which it had carried to the end of the transit at its own yard."
> 192 U. S. 568, 570.

In other words, a railroad company has a right to consider its own interest as this Court has said in the Import Rate Case: "The fair interests of the carrier companies" must be considered.

The fact that the Alabama and Vicksburg Railway declines to make a joint through arrangement or a rebilling arrangement with the Valley Road and at the same time makes one with the V. S. & P. Road constitutes no undue discrimination. This was directly decided in the following cases:

> G. C. & S. F. Ry. vs. Miami S. S. Co., 30 C. C. A. 42, 86 F. R. 407;
> K. & I. Bridge Co. vs. L. & N. R. R., 37 F. R. 567;
> Oregon S. L. vs. Nor. Pac. R. Co., 51 F. R. 465;
> Ill. Waco R. & N. Co. vs. O. S. L., 6 C. C. A. 495, 57 F. R. 673;

A. T. & S. F. Ry. vs. Denver & N. O. R. Co., 110 U. S. 667;
Express Cases, 117 U. S. 1;
L. & N. R. R. Co. vs. West Coast Naval Stores Co., 198 U. S. 483;
Sou. Pac. Co. vs. I. C. C., 200 U. S. 536.

This Court held in the West Coast Naval Stores Case, above cited, that it was no undue discrimination for the Louisville & Nashville Railroad to prevent a shipper from using its wharf at Pensacola, Florida, for shipping his goods over a rival steamship line running in competition with the steamship line with which the Louisville & Nashville Railroad had made through rates and divisions and formed practically a new and independent line of its own.

The West Coast Naval Stores Company desired to use the wharf of the L. & N. at Pensacola for the purpose of shipping its product by tramp steamships. The Louisville & Nashville Railroad objected to the use of its wharf for this purpose and claimed that it had built its wharf to be used in connection with certain steamships with which it had formed a *quasi* partnership for the handling of through traffic.

This Court decided that there was no undue discrimination involved in this refusal and that the Louisville & Nashville had a perfect right to enter into exclusive arrangements with certain connections and could not be forced into partnership with other steamship companies, the rivals and competitors of its connection. Under this ruling there is no undue discrimination involved in the refusal of the Alabama and Vicksburg Railway to enter into rebilling arrangements with the Valley road, a rival and competitor of its connection and partner, the Vicksburg, Shreveport and Pacific Railroad.

Again, in the "Orange Routing Cases," decided at the last term of this Court, it was held that the lines initial in

California and engaged in the citrus fruit trade could select their connections at their eastern termini, and were not obliged to form a connection with every line making a physical connection with their eastern termini, that they had a right to make through arrangements with some connections and not with others, and that it was not undue discrimination to require a shipper to observe certain rules and regulations as to routing, for, inasmuch as the California lines were not obliged to make through arrangements at all, they could impose such reasonable limitations and conditions as were proper, it being open to the shipper to use the through route or not as he saw fit.

So in the case at bar, it is open to the shipper at Vicksburg or any other shipper to use the through route and take advantage of the rebilling arrangement provided by the Alabama and Vicksburg Railway and the Vicksburg, Shreveport and Pacific Railroad, if he desires to do so upon the conditions imposed, which are eminently reasonable and open to any one caring to patronize the route.

It would certainly be most unreasonable to force the Alabama and Vicksburg Railway into partnership with a rival and competing line against its will, and this is the effect of the order of the Mississippi Railroad Commission.

Considering all the circumstances in the light of the cases, we therefore feel that we can confidently answer the question put by the Justice in the negative, and say that there is no undue discrimination against any one, nor would it be justice to force the Alabama and Vicksburg Railway to enter into a partnership with its rivals and competitors in business, which is the effect of the order of the Mississippi Railroad Commission.

Congress Alone Can Correct Undue Discriminations With Respect to Interstate Commerce.

We here repeat what we said at page 82 of our original brief.

But conceding, for the purposes of argument only, that undue discrimination is created by confining the interstate rebilling arrangement in question exclusively to the Vicksburg, Shreveport and Pacific Railway, it is not within the province of the Mississippi Railroad Commission to attempt a correction of such discrimination as to interstate traffic.

> "But when it is attempted to apply to transportation through an entire series of States a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, *its own methods to prevent discrimination in rates*, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States can not be overestimated." (Italics ours.)
>
> 118 U. S., 557-577.

Power to correct undue discriminations as to interstate traffic has been vested by Congress solely in the machinery created by the Act to regulate commerce, and the Mississippi Railroad Commission has no jurisdiction in the premises.

> G. C. & S. F. Co. vs. Hefley & Lewis, 158 U. S., 98;
> L. & N. R. Co. vs. Eubank, 184 U. S., 27.

The Principle Herein Involved is World-Wide. Supposed Discrimination Universally Complained of.

The principle involved in this case is of such importance and of such worldwide prevalence that we may be pardoned for calling attention to the fact that all over the world the same thing has been complained of.

The necessities of trade put it beyond the power of the railways or other transportation lines to do more or less than succumb to the imperative forces which control the situation.

Experience demonstrates that low grade traffic, such as grain, will not move long distances except at low rates. Railroad companies and other transportation companies in recognizing this fact, pursuant to the insuperable force of circumstances, have been frequently complained of, simply because the public believes that they voluntarily and viciously make low rates for the purpose of unjust discrimination and for no other reason.

The very same thing which is now the subject of discussion in this Vicksburg Case is thus spoken of by Mr. Hadley, now President of Yale College, in his work on Railroad Transportation, at page 181:

> "Thus, the rate from Glasgow to London on the beef of American cattle slaughtered at the wharf is 45s per ton, while for Scotch meat the rate for the same service is 77s. Foreign hops are charged 17s. 6d. per ton from Boulogne to London; English hops are charged 35s per ton from intermediate points. Norway lumber is conveyed at about half the rates charged for English lumber of the same quality. There are hundreds of such examples which might be given. Of course, English producers feel very indignant at such discriminations; and they feel worse because it all seems to be for the benefit of foreigners."
>
> Hadley's Railroad Transportation 181.

Professor Hadley also gives an interesting account of the attempt of Prince Bismark to prevent low divisions of through rates being accorded to traffic coming from Austria into Prussia, on the theory that these low divisions operated as a discrimination against Prussian manufactures. He shows that the only result was to drive the traffic from the Prussian railways and thus deprive them of the revenue derived therefrom. He further shows that the traffic still continued over the waterways of Prussia in connection with Austrian railways, and finally concludes with the observation

> "It is clear that even with the whole power of the European Governments, the laws of trade have proved too strong for any arbitrary attempt at railroad regulation to succeed."
> *Id.* 248.

The fact that the Iron Chancellor, with all his authority and great intellect, coupled with the fact that the Prussian Government owned the railways, was powerless to override the laws of trade is of considerable interest.

There is one thing certain, and that is, that low grade freight, such as grain, will not move long distances except upon low rates. It is further certain that it is not undue discrimination for a railway company to recognize this fact, for it can not help itself.

New Bills of Lading Customarily Issued at Many Stages of Through Shipment.

The Supreme Court of Mississippi misconceives the true nature of a rebilling rate and whatever may have been the former opinion of the Interstate Commerce Commission on this question its present views, since the decision of this Court in the Import Rate Case are radically different.

The Commission now recognizes that an enormous volume of the commerce of this country is conducted on the plan of taking out new bills of lading as the property proceeds on its journey, either in its original form, like grain, for example, or in some changed form, such as flour, and that the mere fact that it proceeds from one point to another on one bill of lading, and is there unloaded or put in an elevator remaining for a brief period before it again proceeds on its journey on a new bill of lading, does not at all change the through character of the shipment. In fact, nearly all the grain exported from the United States through every port in the United States follows this course.

> "Looking now to the articles involved in this investigation, we find that flour is almost invariably exported upon a through bill and at a through rate. This falls, therefore, exactly within the terms of the decision of the Supreme Court of the United States. We think that the export rate upon grain is equally within the spirit of that decision. *For certain reasons, mainly the preference of the foreign buyer for a ship's bill of lading, grain is not usually exported upon through bills; but the whole transaction is none the less in fact a through shipment.* The grain starts for and proceeds to the foreign destination. Every consideration which renders it proper to accept less as a division of the through rate on export flour renders it equally proper to accept a lower rate upon the grain itself to the port of export." (Italics ours.)
>
> 8 I. C. R., 214, 255.

Again in the Cotton Compress Case the Commission says:

"It is still further urged that the ownership of the cotton changes at the compress. The testimony does not show this. But, assuming that it did, how would that alter the character of the transaction? The ownership of merchandise frequently changes en route. Bills of lading are usually transferable, and the sale of the bill of lading operates as a transfer of the title to the property. *Frequently the carrier takes up the old bill of lading and issues in its place one or more new bills of lading during the period of transit, but this in no way alters the character of the carriage, nor is it apparently in violation of the Commerce Act.*" (Italics ours.)

8 I. C. R. 121, 137.

In the case of Rosenbaum Grain Company vs. C. R. I. & T. Ry., 130 F. P. 46, the United States Circuit Court for the Northern District of Texas restrained the Texas Railroad Commission from enforcing an order to "cancel out" certain "proportional rates" whereby the Rosenbaum Grain Company handled grain at Fort Worth, Texas, through its elevators. It appears in the bill, but not clearly in the opinion of the Court that the "proportional tariffs in force permitted the grain to be stopped over in the elevators for a period of several months, whereafter it could be exported. The effect of the order of the Texas Railroad Commission was to require the grain to be sent on in exactly the same car in which it reached Fort Worth. This order would have destroyed the business of the Rosenbaum Company, and would have destroyed Fort Worth as a grain center, and is very similar to the order promulgated by the Mississippi Railroad Commission in the case now at bar, and would be precisely in accord with the opinion of the Supreme Court of Mississippi as to what constitutes a rebilling rate. The Federal Court enjoined the order of the Texas Railroad Commission in the Rosenbaum case because the same interfered with interstate commerce.

This decision in effect necessarily held that the movement was a through movement of grain, notwithstanding the fact that it is unloaded from the cars and put into the elevators at Fort Worth and kept there several months. It not only held that it was a through movement, but also that it was an export movement, and we have seen that nearly all grain exported proceeds from the port on a new bill of lading or a ship's bill of lading.

The opinion of the Court in the Rosenbaum case does not disclose whether or not the grain reached Fort Worth on one bill of lading, was taken out and put into the elevators and then after the expiration of a certain time was forwarded from Fort Worth to the port on a new bill of lading. But this was doubtless the case, for this is the practice in vogue all over the country as to grain. At any rate, the decision could not have been given unless the movement was considered a through movement, notwithstanding the fact that the grain was taken out at Fort Worth and put in the elevators.

This opinion was affirmed by the Circuit Court of Appeals for the 5th Circuit.

See 130, F. R., 110.

It is quite erroneous to suppose that in order to constitute a through movement there must be a bill of lading from point of origin to point of destination, or that the goods must be carried on in the same cars in which they started.

The slightest reflection will prove the truth of this. A person may start from Washington to Yokohama and may buy a ticket from Washington to St. Louis, remain over in St. Louis a few days for rest, and then buy another ticket from St. Louis to San Francisco, where he may remain over several days and then proceed on his journey under another ticket covering that part of the transportation which is to

be done by sea. The movement would be a through movement from Washington to Yokohama.

Large quantities of tea are sent from China to Russia as a through movement. The camels, sleighs and other vehicles involved in the transportation are changed and the goods are unloaded and reloaded en route and may remain at various stages of their journey at rest for a considerable period of time, yet the movement is a through movement and has been so considered for ages.

In Kelly vs. Rhoads, 188 U. S. 1, this Court held that driving a flock of sheep across a State, the flock being rested over night and grazed on the way, constituted a through and continuous movement, without the intervention of any bill of lading whatever.

Whether or not the movement is a through movement or a local movement depends upon the facts surrounding the movement and the existence or the non-existence of a bill of lading is only one of the facts to be considered, and not the decisive element or the controlling factor.

As was well pointed out in the case of Coe vs. Errol, 116 U. S. 517, goods may start for export from a State to some foreign country and

> "though intended for exportation, they may never be exported; the owner has a perfect right to change his mind. * * *"
>
> 116 U. S., 517, 526.

So it is quite possible for an export bill of lading to be taken out and the goods actually started on their journey, and then the owner may change his mind and stop the goods in transit within the borders of the State and convert what on the face of the bill of lading is a foreign movement, into a local movement, the goods being stopped at some point where they might be consumed. It is not uncommon for cotton raised within the borders of a State

to be sent to a port for export and yet the owner may change his mind and sell the very cotton originally intended for export to some mill within the State which will consume it and the cotton never be exported.

The bill of lading is not, therefore, the controlling criterion of a through movement, but as this Court has decided, whether or not the movement is through or local depends upon the facts of the actual transaction. Hence the new and recent rulings of the Interstate Commerce Commission are in accord with the decisions of this Court and right reason.

Respectfully submitted,

HARRY H. HALL,
Counsel for Alabama & Vicksburg Railway Company.

McWILLIE & THOMPSON
Associate Counsel.